STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

WILLIAM LARON JOHNSON,
Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 248480

37th Circuit Court No. 02-4605 FH

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PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

Index of Authorities i
Counter-Statement of Appellate Jurisdiction and Grounds for Appeal ii
Counter-Statement of Questions iii
Counter-Statement of Facts 1

Argument:

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THE PROSECUTION COULD SEEK TO IMPEACH DEFENDANT WITH HIS PRIOR THEFT CONVICTIONS PURSUANT TO MRE 609 . . . 4

II. RESENTENCING IS NOT REQUIRED SINCE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SCORING OFFENSE VARIABLES 10 AND 11 8

Prayer for Relief 11

INDEX OF AUTHORITIES

CASES:	**PAGES:**
People v Abraham, 256 Mich App 265; 662 NW2d 836 (2003)	7
People v Allen, 429 Mich 558; 420 NW2d 499 (1988)	4
People v Bartlett, 197 Mich App 15; 494 NW2d 776 (1992)	6
People v Carines, 460 Mich 750; 597 NW2d 130 (1999), *reh'g den* 461 Mich 1205; 602 NW2d 576 (1999)	5, 6
People v Daniels, 192 Mich App 658; 482 NW2d 176 (1991), *amended and lv den* 440 Mich 880, 882; 487 NW2d 464 (1992)	6
People v Finley, 431 Mich 506; 431 NW2d 19 (1988)	5
People v Lester, 172 Mich App 769; 432 NW2d 433 (1988), *lv den* 453 Mich 944; 557 NW2d 308 (1996)	5
People v Leversee, 243 Mich App 337; 622 NW2d 325 (2000), *lv den* 464 Mich 858; 630 NW2d 334 (2001)	9
People v McLaughlin, 258 Mich App 635; 672 NW2d 860 (2003), *lv den* 469 Mich 1037; 679 NW2d 70 (2004)	9, 10
People v Pollick, 448 Mich 376; 531 NW2d 159 (1995)	6

COURT RULES:	**PAGES:**
MCR 7.301(A)(2)	ii
MCR 7.302(B)	ii
MRE 609	4, 5, 6, 7
MRE 609(a)	5

COURT RULES:	**PAGES:**
Michigan Sentencing Guidelines Manual	9

COUNTER-STATEMENT OF APPELLATE JURISDICTION AND GROUNDS FOR APPEAL

Defendant applies for leave to appeal from the October 28, 2004 opinion of the Michigan Court of Appeals affirming his conviction. (See Defendant-Appellant's Appendix A). MCR 7.301(A)(2). Plaintiff-Appellee submits that Defendant-Appellant has not set forth sufficient grounds in his application, pursuant to MCR 7.302(B), and that the instant application should be denied.

COUNTER-STATEMENT OF QUESTIONS

I. WHETHER THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THE PROSECUTION COULD SEEK TO IMPEACH DEFENDANT WITH HIS PRIOR THEFT CONVICTIONS PURSUANT TO MRE 609?

The court of appeals answered, "Yes."

The trial court answered, "Yes."

Plaintiff-Appellee answers, "Yes."

II. WHETHER RESENTENCING IS NOT REQUIRED SINCE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SCORING OFFENSE VARIABLES 10 AND 11?

The court of appeals answered, "Yes."

The trial court did not address this issue.

Plaintiff-Appellee answers, "No."

COUNTER-STATEMENT OF FACTS

Lanquinsha Durham (DOB 12/14/85) was seventeen years old at the time of trial. She knew Defendant through her cousins, but she and Defendant were not related. (TI 72). Ms. Durham met Defendant when she was fifteen, in 2001, and considered him a friend, though they did not have a boyfriend-girlfriend relationship. (TI 73, 79). Ms. Durham did not want to testify, but was subpoenaed to testify. (TI 85).

Defendant had sexual contact with Ms. Durham in November, 2001, about three months after they met. (TI 74-75, 79). After talking and playing cards, Ms. Durham and Defendant had intercourse in his bedroom. (TI 76). They did not use any form of birth control. (TI 77). Ms. Durham did not recall talking about having sex with Defendant before they did. (TI 78).

Afterwards, Ms. Durham went home, alone. (TI 78).

Defendant had sex with Ms. Durham a second time the same month, before she turned sixteen. (TI 79, 85). Ms. Durham's cousins were at Defendant's house with Ms. Durham on both occasions. (TI 80). The second time also took place in Defendant's bedroom. (TI 81). They watched television, ate, and then had sexual intercourse. (TI 82).

Ms. Durham recalled Defendant also coming over to her residence where they had sex, though she stated she was sixteen years old at this time. (TI 84, 96). Ms. Durham gave birth to a child on August 8, 2002. (TI 83). Ms. Durham told the authorities[1] that Defendant was the father of this child, but later learned he is not; and Ms. Durham did not divulge having sex with anyone else. (TI 83, 93, 98-99). Ms. Durham thought Defendant was the father of her child and did not think it could be the other man because she only had sex with the other man once. (TI 101-102). Ms. Durham told Detective Wise that she was fifteen when she had sex with

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[1] Child Protective Services filed a report in this matter. (TI 114).

Defendant. (TI 115). The parties stipulated to admission of the DNA report which excluded Defendant as being the father of Ms. Durham's son. (TI 117).

Detective Brad Wise spoke with Defendant, who agreed to talk to him in September, 2002. (TI 106, 113). Detective Wise asked Defendant if he thought he was the father of Ms. Durham's baby. Defendant responded that he was not sure, but he planned on having a paternity test to determine whether he was. (TI 106). Defendant told Det. Wise he met Ms. Durham through mutual friends of the family. Defendant also told the detective that he had sex with Ms. Durham twice; the first time Defendant thought alcohol was involved. Defendant denied knowing Ms. Durham's age when they had sex and further told the detective that when he learned she might be fifteen, he quit having sex with her. (TI 107-108). Defendant told the detective there was no force or coercion, and the sex was consensual. (TI 109).

Defendant wrote to Ms. Durham in October, 2002, signing the letter with "much love"; and in the letter, Defendant told Ms. Durham not to go to court, but if she did, not to say anything. Defendant wrote that, if she said anything, he wanted Ms. Durham to state that she lied to him about her age. Defendant also wrote that all that was needed to convict him was for Ms. Durham to testify that they did have sex two times while he knew she was fifteen. Defendant also asked in the letter why Ms. Durham did not send more pictures of the baby and that he thought the baby looked more like her than him. (TI 89 PX 1; TI 111-112).

Defendant's direct examination began with a recital of his convictions for breaking and entering in 1999 and receiving and concealing stolen property in 2000. (TI 123). Defendant testified he had sex with Ms. Durham, but not until after December 24, 2001, when he was taken off his tether. (TI 125). Defendant explained a tether is a device on the ankle that alerts authorities when one leaves the house. (TI 125). Defendant acknowledged the first time he had

sex with Ms. Durham was at his house. The second time, he testified, was at her house. (TI 126). Defendant agreed that he could have sex in his house on tether. (TI 139). Defendant denied having a sexual relationship with Ms. Durham in November, 2001. (TI 127). Defendant stated he ended the sexual relationship in March when Ms. Durham's mother told Defendant she was only sixteen. (TI 128). Defendant testified he thought sixteen was considered underage. (TI 128).

When Defendant learned Ms. Durham was pregnant, he stated he thought just "a little bit" that he might be the father. (TI 129). On cross examination, Defendant first denied ever thinking he could be the father of the baby; and after being questioned about the letter[2] he said again that he may have thought a "little bit" that he could be. (TI 139). Defendant acknowledged the letter he sent to Ms. Durham and said he also sent her other letters. (TI 129). Defendant denied telling Detective Wise he learned Ms. Durham was only fifteen, and that he learned she was sixteen. (TI 131). He also denied telling Detective Wise when they had sex. (TI 140). Defendant denied wanting Ms. Durham to lie if she testified and stated that he just did not want her to come to court. (TI 133, 142). He also did not remember writing in the letter to Ms. Durham, "But I do want you to tell them that you told me that you was older than 15, kay?" (TI 142).

Additional facts will be set forth as they relate to the case at bar.

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[2] In the letter Defendant wrote about the baby looking more like Ms. Durham or himself, he also wrote denying that he told his own mother that the baby was not his. (TI 140).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THE PROSECUTION COULD SEEK TO IMPEACH DEFENDANT WITH HIS PRIOR THEFT CONVICTIONS PURSUANT TO MRE 609.

Standard of Review:

The People agree with Defendant's statement of the standard of review for this issue. See People v Allen, 429 Mich 558, 596; 420 NW2d 499 (1988).

Discussion:

Before testimony was taken, the prosecutor requested the court determine whether or not Defendant's prior theft convictions could be used to impeach Defendant should he testify. (TI 55). The prosecutor argued the probative value was high, while the potential for prejudice was extremely low, in light of the dissimilar nature of the prior crimes and charged CSC and the instruction the court would give the jury. (TI 56). In response, defense counsel stated a "general objection. . . and let the Court use its discretion as to whether or not it feels that the probative value outweighs that of the prejudicial value. . . ." (TI 57).

MRE 609 states, in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted **unless the evidence has been elicited from the witness** or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility, and if the witness is the defendant in a criminal

> trial, the court further determines that the probative value of the evidence outweighs its probative effect.

MRE 609(a) (emphasis added).

Defendant argues the trial court abused its discretion by ruling the prosecutor could utilize MRE 609 to impeach Defendant on cross examination. While Plaintiff acknowledges that a defendant does not waive his right to appellate review by introducing the prior convictions during direct examination, as discussed in People v Lester, 172 Mich App 769; 432 NW2d 433 (1988), *lv den* 453 Mich 944; 557 NW2d 308 (1996), in this case, the prosecutor did not actually impeach Defendant on cross examination with his prior crimes. And as Defendant notes, a defendant must testify and be impeached with his prior convictions, in order to preserve the issue for appeal. (Defendant's Brief on Appeal, at 8 (citing People v Finley, 431 Mich 506; 431 NW2d 19 (1988)). The case against Defendant was strong, and the prosecutor was able to confront Defendant's direct testimony with the letter he wrote to Ms. Durham; therefore, this case presented a situation as discussed in *Finley* where "the case against the defendant is strong, or other avenues of impeachment are available, it is possible that the defendant's prior record would not have been used." Finley, *supra* at 513 (citation omitted).

Therefore, the People question whether this issue is actually preserved for appeal, and if so, to what extent. It is clear that a part of Defendant's current argument is not preserved, that being whether the trial court abused is discretion in ruling on whether the prior convictions would be considered more probative than prejudicial, since trial counsel "[l]et the Court use its discretion as to whether or not it feels that the probative value outweighs that of the prejudicial value. . . ." (TI 57). Claims of error must be preserved in the record for appellate review. People v Carines, 460 Mich 750, 762-765; 597 NW2d 130 (1999), *reh'g den* 461 Mich 1205; 602 NW2d 576 (1999). Counsel may not harbor error as an "appellate parachute." People v

Pollick, 448 Mich 376, 387; 531 NW2d 159 (1995) (citation omitted). Defendant waived this issue for review when trial counsel informed the trial court that it would leave the decision to the court's discretion. See Carines, *supra* at 762 fn. 7 (definition of waiver).

Defendant argues the trial court failed to adequately express the age of the prior convictions on the record, or the probative value of the prior convictions, other than generally, as Defendant alleges was done, or the impact on the defense. First, the prosecutor discussed the age of the convictions (1999 and 2000), and so certainly the court was advised of the age. Secondly, the court did include in its ruling its analysis on the probative value versus the prejudicial impact to the defense and the nature of the offense. The trial court actually stated in its ruling the following:

> [T]he first two offenses contain an element of theft that have been referenced by the Prosecution... and their punishment... fits 2A. The determination for me is whether the probative value outweighs any prejudicial impact. And, first of all, the question is what is probative on the issue of credibility. . .it seems to me it does have a probative value. Given the nature of this offense, compared to what's being sought to be used for impeachment purposes, I don't believe that the prejudicial impact outweighs the probative value. And so should the Defendant testify, the Prosecution will be in position to be able to impeach him and I'll give the appropriate instruction . . .

(TI 57). The trial court adequately articulated its reasoning in compliance with MRE 609. Plaintiff does agree that the trial court did not explicitly state that the convictions at issue occurred in 1999 and 2000 in its ruling, however, this should not amount to an abuse of discretion. See People v Daniels, 192 Mich App 658; 482 NW2d 176 (1991), *amended and lv den* 440 Mich 880, 882; 487 NW2d 464 (1992) (trial court did not articulate reasoning or otherwise comply with rule, but harmless error); People v Bartlett, 197 Mich App 15; 494 NW2d 776 (1992) (if admission of prior conviction was error, it was harmless in light of overwhelming evidence of guilt).

Furthermore, Plaintiff disagrees with Defendant's assessment of the strength of the case against Defendant. Defendant emphasizes Ms. Durham lied to the police about the father of her baby. It was stipulated that Defendant was not actually the father of Ms. Durham's baby. Ms. Durham testified that at first, she reasonably believed Defendant to be the father, in light of their November relations and the August birth of her child, and that she did not believe another man could be the father since she only had sexual relations with the other person once. In any case, the parentage of Ms. Durham's child was not at issue, nor does it negate Defendant's culpability. Defendant also argues that it is likely that he was the only person who could testify to the dates of sexual intercourse. However, Ms. Durham testified that other people were present, albeit not in the same room, in Defendant's house when they were together. However, the strength of the prosecution's case rested in Ms. Durham herself, who admittedly did not want to testify, and the letter written by Defendant to Ms. Durham, telling her what to say and not to say in court.

Defendant concludes by arguing that he was prejudiced by admission of his prior convictions, even though the trial court instructed the jury on the restricted use of this evidence. This argument is of no merit since juries are presumed to follow their instructions, and the instructions are in turn presumed to cure most errors. People v Abraham, 256 Mich App 265, 278-279; 662 NW2d 836 (2003).

The trial court did not abuse its discretion by ruling the prosecutor could impeach Defendant with his prior convictions, though the prosecutor ultimately chose not to do so. Further, the trial court sufficiently complied with the requirements of MRE 609. Defendant's request for relief should be denied.

II. RESENTENCING IS NOT REQUIRED SINCE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SCORING OFFENSE VARIABLES 10 AND 11.

Standard of Review:

The People agree with Defendant's statement of the standard of review for this issue.

Discussion:

Defendant was sentenced as a habitual offender, fourth offense. (ST 3). Defense counsel objected to the scoring of Offense Variables 10 and 11 (OV 10, OV 11). The trial court overruled counsel's objections, after ensuring that Defendant was properly scored. (ST 7). The trial court, in sentencing Defendant to a term of 100 to 480 months with the Michigan Department of Corrections, stated:

> You're 21 years old, and you have a horrible, horrible record to this point as an adult, let alone as to any term of imprisonment you're presently serving as it is. . . [a]nd that's what driving, to a great extent. . . the range in terms of the sentencing range. . .a 10-year old or a 15-year old does not have the maturity level of a 21-year old, even. And shouldn't be placed in some of these positions that you placed them in, and went a juvenile. And - this offense which you committed while you were on parole is going to run consecutive along with as well. . .

(ST 12-13).

Defendant was scored ten points for the exploitation of a vulnerable victim, pursuant to OV 10. Defendant argued that Ms. Durham was close to the age of consent and that the sexual acts were consensual. The prosecutor argued that the legislature has determined that someone fifteen years old cannot give consent, and therefore, scoring ten points for the exploitation based on youth was appropriate. (ST 5-6).

A score of ten point under OV 10 is appropriate when the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the

offender abused his or her authority status." Michigan Sentencing Guidelines Manual, Crimes Against a Person, OV 10. The sentencing court has discretion to determine the points to be scored for an offense variable, provided there is record evidence that supports the score. People v Leversee, 243 Mich App 337, 349; 622 NW2d 325 (2000), *lv den* 464 Mich 858; 630 NW2d 334 (2001).

The trial court could reasonably find, based on the record evidence, that ten points was appropriate in this case. Defendant was five years older than Ms. Durham, who lacked his maturity and experience, which included an extensive criminal history. As exemplified by Defendant's letter, introduced in to evidence at trial, Defendant was aware of Ms. Durham's age and his relationship to her such that he felt he could tell her what to say in court; and he assumed she would comply. Defendant also questions whether Ms. Durham could understand what he was writing to her when he wrote, "Did you understand all of that - I hope so!" (PX 1). There was record evidence to support ten points for OV 10.

Defendant also argues his score of 25 points for sexual penetrations was improper. The prosecutor explained there were two counts of criminal sexual conduct, two penetrations testified to by Ms. Durham. Therefore, in terms of sentencing for one count, an additional penetration existed that was not the basis of that count. (ST 6). The court had the prosecutor explain this score in light of the other variables, in particular OV 13 (continuing pattern of criminal behavior), to ensure that Defendant was not "being doubled up, so to speak, in terms of scoring. . . as it relates to 11, 12 and 13. . . that does not appear to be the case. . . " (ST 7).

The trial court was correct in finding the score of 25 points was appropriate in light of the explanation set forth by the appellate court recently in People v McLaughlin, 258 Mich App 635; 672 NW2d 860 (2003), *lv den* 469 Mich 1037; 679 NW2d 70 (2004):

> [T]he proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is a first-degree or third-degree CSC. . .trial courts may assign points . . .for "all sexual penetrations of the victim by the offender arising out of the sentencing offense," while complying with the mandate of 41(2)(c), by not scoring points for the one penetration that forms the basis of a first or third degree CSC offense. Accordingly, trial courts are prohibited from assigning points for the one penetration that forms the basis of a first or third degree CSC offense that constitutes the sentencing offense, but are directed to score points for penetrations that did not form the basis of the sentencing offense.

McLaughlin, *supra* at 676-677.

The Court rejected an argument similar to Defendant's which it stated, in cases involving multiple counts, the trial court could not score any points under OV 11 since every penetration was the basis for a charge. McLaughlin, *supra* at 677. Defendant was properly scored under the guidelines, and his request for relief should be denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee prays that this Honorable Court deny Defendant-Appellant's Application for Leave To Appeal and deny his request for relief.

Respectfully submitted,

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DATED: December 7, 2004

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